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No. 06-306

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In The

Supreme Court of the United States

MARIANNE SAWICKI,

Petitioner,

v.

MORGAN STATE UNIVERSITY
and STATE OF MARYLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
Argument	1
This Case Presents An Appropriate Vehicle For Resolving The Question Presented	1
Conclusion	7

TABLE OF AUTHORITIES

Page

CASES:

Burlington Northern & Santa Fe Rwy. v. White, 126 S.Ct. 2405 (2006) 6

Gideon v. Cochran, 135 So.2d 746 (Fla. 1961) 5

Gideon v. Wainwright, 372 U.S. 335 (1963) 5

Griffin v. Washington Convention Center, 142 F.3d 1308 (D.C.Cir. 1998) 4

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (3d Cir. 2004) (en banc) 2, 3, 4, 5

Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004) 4

Russell v. McKinney Hospital Venture, 235 F.3d 219 (5th Cir. 2000) 4

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000) 4

Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997) 4

OTHER AUTHORITIES:

Appellant's Informal Brief, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.) 3, 4

Appellee's Informal Brief, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.) 3

Appellant's Petition for Rehearing of Appeal or Rehearing En Banc, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.) 4

TABLE OF AUTHORITIES – Continued

Page

Petition for Writ of Certiorari, *BCI Coca-Cola v. EEOC*, No. 06-341 ..... 5, 6

Petitioner's Reply Brief, *BCI Coca-Cola v. EEOC*, No. 06-341 (hereinafter "BCI Reply Brief") 1, 4, 6

ARGUMENT

THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Petitioner submits this supplemental brief pursuant to Rule 15.8 of this Court. Petitioner's reply brief was filed on November 14, 2006. The instant case was initially considered at the conference of December 1, 2006, and has now been redistributed for the conference of January 5, 2007. On December 18, 2006,[1] the petitioner in *BCI Coca-Cola v. EEOC*, No. 06-431, filed a reply brief which argued, inter alia, that the Court should not grant review in *Sawicki*.[2] The arguments advanced in that December 18 reply brief in *BCI Coca-Cola* were not raised by the respondent in *Sawicki* itself, and thus were not available at the time when Sawicki's earlier reply brief was filed. This supplemental brief is limited to addressing those new arguments.

BCI argues that the lower court in *Sawicki* "actually decided to dismiss the plaintiff's Title VII *claims* on multiple grounds." (BCI Reply Brief, p. 6) (emphasis added). The question presented in *Sawicki* concerns only one of those Title VII claims: whether the employer can be held liable under Title VII for discrimination by two lower level supervisors, the Chair and Dean? BCI does not actually contend that the Title VII claim based on discrimination by the Chair and Dean was rejected "on

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[1] A copy of that Reply Brief was provided to counsel for petitioner Sawicki on December 21, 2006, by electronic transmission.

[2] Petitioner's Reply Brief, *BCI Coca-Cola v. EEOC*, No. 06-341 (hereinafter "BCI Reply Brief"), pp. 6-9.

multiple grounds." To the contrary, the only basis on which the courts below dismissed the claims regarding the Chair and Dean was the disputed rule in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (3d Cir. 2004) (en banc).[3] (Pet. App. 19a, 22a).

The other "multiple grounds" referred to by BCI were relied on by the courts below in resolving a quite distinct Title VII claim: the contention that two other higher officials, the President and Vice-President, had also discriminated against Sawicki. The courts below acknowledged that even under *Hill* the employer was responsible for the actions of the President and Vice-President, but concluded that there was insufficient evidence of discrimination by those two officials. It was solely with regard to the Title VII claim regarding the President and Vice-President (not the claim regarding the alleged discrimination by the Chair and Dean) that the courts below engaged in "a single motive analysis under *McDonnell Douglas Corp. v. Green* . . . and . . . a mixed motive analysis under *Desert Palace, Inc. v. Costa*." (BCI Reply Brief 6; see Pet. App. 22a-23a, 32a). And it was only in analyzing the evidence regarding the motives of the President and Vice-President that the courts below considered the Fourth Circuit's admonition regarding tenure disputes. (BCI Reply Brief 7; see Pet. App. 23a, 24a, 32a). The courts below had no reason to rely on these considerations in rejecting the claims related to the Chair and Dean because

[3] Similarly, in the litigation below the respondent relied solely on *Hill* in opposing the Title VII claim advanced by Sawicki regarding discrimination by the Chair and Dean.

under *Hill*, even conceded discrimination by the Chair and Dean would not give rise to Title VII liability.[4]

BCI objects that in the Fourth Circuit Sawicki's appeal "was pro se and involved a myriad of issues." (BCI Reply Brief, 7). But BCI does not actually contend that Sawicki failed to raise in the court of appeals the question presented set out in the petition. To the contrary, in the litigation before the panel, Sawicki expressly objected to the action of the district court in relying on *Hill* to dismiss her Title VII claim regarding discrimination by the Chair and Dean.[5] The panel that initially heard this case, of course, was bound by the Fourth Circuit's earlier en banc decision in *Hill*. Following the issuance of the panel decision, Sawicki filed a petition for rehearing en banc expressly urging the Fourth Circuit to abandon the rule in

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[4] BCI argues:

> Although it relied upon the district court's "reasoning," the Fourth Circuit did not explain whether, and to what degree, that included the teacher-tenure rule, the *McDonnell Douglas* analysis, the mixed motive analysis, *or* the district court's discussion of *Hill*.

(BCI Reply Brief 8) (emphasis added).

This argument would make sense only if the district court had rejected the discrimination claim regarding the Chair and Dean on four *alternative* grounds: *Hill*, *McDonnell Douglas*, the mixed motive analysis, and the teacher-tenure standard. It is clear, however, that *Hill* was the only basis given by the district court for rejecting that claim.

[5] Appellant's Informal Brief, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 4-5. This is the first issue set out in Sawicki's appellate brief. Morgan State, in its responsive brief, insisted that under *Hill* the district court properly concluded that any discrimination by the Chair and Dean was legally irrelevant. Appellee's Informal Brief, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 4-5.

Hill.[6] That rehearing petition, although written by a non-attorney, presented a clear and cogently framed argument against the holding in *Hill*. Sawicki's rehearing petition in the court of appeals argued that the decision in *Hill* conflicted with the decisions in numerous circuits, relying on many of the same decisions subsequently cited by counsel for petitioner in *BCI Coca-Cola v. EEOC*.[7]

BCI objects that the decision of the Fourth Circuit below contains "no appellate court analysis of the subordinate bias liability standard." (BCI Reply Brief, p. 8). But BCI does not contend that there is any uncertainty regarding what standard was applied below. To the contrary, the panel in this case – like every panel in the Fourth Circuit since the 2004 en banc decision in *Hill* – was constrained to apply the specific standard established by *Hill* itself. The certiorari petition in *BCI Coca-Cola v. EEOC* explains at length, and correctly, that *Hill* announced the definitive

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[6] Appellant's Petition for Rehearing of Appeal or Rehearing En Banc, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 1-10.

[7] *Compare* Appellant's Petition for Rehearing of Appeal or Rehearing En Banc, *Sawicki v. Morgan State University*, No. 05-1891 (4th Cir.), pp. 2-6, *with* Petition for Writ of Certiorari, *BCI Coca-Cola v. EEOC*, No. 06-341, pp. 7, 8, 10, 11, 15-18.

The circuit court decisions conflicting with *Hill* that were cited in both the petition for rehearing in *Sawicki* and the petition for writ of certiorari in *BCI Coca-Cola* were *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1997), *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004), *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998), and *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000).

Fourth Circuit subordinate bias liability standard.[8] In the Fourth Circuit both parties filed briefs acknowledging the *Hill* standard. That standard was well known to the panel, two of whose members had participated in the en banc decision in *Hill* itself. So long as a question presented was clearly raised in the proceedings below, even by a pro se litigant, the absence of a detailed appellate opinion is no barrier to consideration by this Court. *Compare Gideon v. Wainwright*, 372 U.S. 335 (1963), *with Gideon v. Cochran*, 135 So.2d 746 (Fla. 1961) ("Habeas corpus denied without opinion").

BCI objects that neither court below "discussed the level of influence" that the biased subordinates had in this case. (BCI Reply Brief, p. 8). But the core holding of *Hill* itself is that "the level of influence" of a biased subordinate is legally irrelevant, because mere influence (or even causation) by a biased subordinate cannot give rise to Title VII liability. *Hill*, 354 F.3d at 291. For that reason neither *Hill* nor any decision applying *Hill* contains any such discussion; under *Hill* a court is precluded from even considering that issue. On the other hand, the *record* in this case contains clear – and at this point undisputed – factual allegations regarding the manner in which the biased subordinates – the Dean and Chair – influenced the decisions to deny tenure to and then to dismiss Sawicki. That record thus provides a well-defined context within which to decide the standard of liability for biased subordinates.

It is somewhat unusual for the petitioner in one case to argue at length that the Court should not grant review

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[8] Petition for Writ of Certiorari, *BCI Coca-Cola v. EEOC*, No. 06-341, pp. 9-11.

in another case. In the instant situation, however, BCI has an understandable interest in persuading the Court to grant only the petition in *BCI Coca-Cola v. EEOC*. In the proceedings below in *BCI Coca-Cola v. EEOC*, the EEOC endorsed the Fifth Circuit liability standard. But in this Court, the position of the United States will be determined by the Solicitor General, not the EEOC. In its Reply Brief, BCI notes optimistically that the Solicitor General's brief in opposition in *BCI Coca-Cola* did not endorse the Fifth Circuit, or the related Tenth Circuit, standard. (BCI Reply Brief, p. 9). That silence, BCI urges, must mean that the Solicitor General has concluded that the Tenth Circuit standard is not correct.[9] If certiorari were granted in *BCI Coca-Cola v. EEOC*, BCI suggests, the Solicitor General's position on the merits of the question at issue will reflect the interests of the federal government "as a public employer." (BCI Reply Brief, pp. 9-10).

BCI's argument in this regard is not without substance. Whenever the government files a brief in this Court regarding the interpretation of Title VII, the Solicitor General must weigh the interests of the federal government as a defendant in Title VII cases as well as the interests of the EEOC, which is charged with enforcing that statute. On a number of occasions the Solicitor General in such cases has expressly rejected the position of the EEOC. *E.g.*, *Burlington Northern & Santa Fe Rwy. v. White*, 126 S.Ct. 2405 (2006). It would undeniably be advantageous for BCI if, following a grant of certiorari in

[9] "Had the Respondent believed that, on remand, the trial of this case would be conducted using the correct standard, then surely that argument – and the reasons therefore – would have been made." (BCI Reply Brief, p. 9).

BCI Coca-Cola alone, the United States were to join BCI in endorsing the Fourth Circuit rule in *Hill*. But such a non-adversarial proceeding would not provide an appropriate context in which to resolve the question presented in this case and *BCI Coca-Cola*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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